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# In the Supreme Court of the United States

## No. 405.

**OCTOBER TERM, 1955.**

GRIMES & HAUER, INC.,
*Petitioner,*

vs.

SAM POLLOCK,
Individually and as International Representative of Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. L., *et al.*,
*Respondents.*

## PETITIONER'S REPLY BRIEF.

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*Respondents.*

## PETITIONER'S REPLY BRIEF.

The same abbreviations, emphasis, etc., will apply here as described in the Petition for a Writ of Certiorari herein. Reference to the Employer's Petition will be (P.) and to Respondents' Brief (Resp. Bf.).

### A STATE COURT'S DECISION ON A FEDERAL QUESTION IS REVIEWABLE JUST AS IS THE DECISION OF A LOWER FEDERAL COURT.

The Union quotes a statement in the opinion of this Court in *Teamsters v. Hanke,* 339 U. S. 470, 475 (Resp. Bf. p. 7) to the effect that here also the judgment of a state court bears a "weighty title of respect." However, the statement in this Court's opinion referred to a judgment of a state court in finding that certain purposes of picketing were contrary to the public policy of that state. The quotation has no application here to a decision by a state court concerning an interpretation of a federal statute.

As to this a state court can lay no claim of a "weighty title of respect."

**THE UNION IS IN ERROR IN CLAIMING THAT INITIALLY THE LABOR BOARD HAS JURISDICTION OF THE INSTANT CASE.**

The Union incorrectly claims (Resp. Bf. p. 8) that the Employer asserts in its Petition that state courts have jurisdiction to supply a state remedy for conduct which is violative of the Act. On the contrary, the Employer has contended throughout these proceedings that the Union's conduct here was not violative of the Act and that by reason thereof Ohio Courts had jurisdiction to supply a state remedy. Incidentally, the Union also contended until its last brief that its picketing did not violate the Act.

The Union contends (Resp. Bf. p. 10) that the Ohio Supreme Court was correct in holding that "initially" a state court must obtain from the Labor Board a ruling as to the Board's jurisdiction, and cites certain statements contained in the opinion of this Court in *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, at pages 475 and 478. Those statements are clearly inapplicable here.

*First.* In *Anheuser-Busch* the employer admitted in its petition that the Union's picketing violated Sections 8(b)(4)(A) and (B) of the Act. As quoted in the Petition here (P. 16) this Court there held that a state court has a duty to hear the evidence and determine whether the state court or the Labor Board has jurisdiction. Also that a state court must decline jurisdiction only if "the facts reasonably bring the controversy" within the prohibitions of Section 8 of the Act (348 U. S. 468, 99 L. ed. (Advance page 386 at page 394)).

*Second.* The Union's quotations from *Anheuser-Busch* (Resp. Bf. p. 10) are inapplicable to the question

here of whether a state court "initially" has jurisdiction to determine whether "the facts reasonably" show the Act to have been violated.

The Supreme Court of Ohio erred in holding that the courts of Ohio had no jurisdiction "initially" to determine their own jurisdiction in the instant case.

**THE UNION CANNOT SUSTAIN ITS CLAIM THAT SECTION 8(b)(4) OF THE ACT WAS VIOLATED.**

The pleadings and evidence showed that the Union's coercive pressure was aimed at the neutral *employer* Kresge, and not at *employees*. The Union claims that the secondary boycott alleged by Employer was violative of the Act because the Employer alleged that a Union officer *threatened* an officer of *Employer* that Kresge's deliveries would be stopped and because "presumably" a cessation of deliveries to Kresge would result from pressure by the Union "upon employees of neutral employers" (Resp. Bf. p. 13). This claim completely ignores the evidence contained in the record as to this matter.

The record shows the following:

(a) That the Employer alleged in its petition in the Trial Court that the Union's conduct, without specifying any particular conduct, constituted a secondary boycott *under the common law of Ohio* because it was intended to cause Kresge to terminate its business relations with the Employer through fear of damage to itself if it failed to do so (R. 8).

(b) That while picketing one of the Kresge stores, the Respondent Pollock called upon the manager of another Kresge store not theretofore picketed, who stated that he would be inclined to close the Employer's concession in his store if any trouble developed there (R. 99). The Union

then extended its picketing to that store and later the Union officer asked this manager if there had been "any change" (R. 100).

The Court of Appeals, in view of these facts, found that part of the picketing "amounted to secondary boycott" under Ohio law (P. App. C, p. 10a).

The Union claims in its statement of the case that the Respondent Pollock told the Kresge manager that he did not want Kresge to break its lease with the Employer (Resp. Bf. p. 4). The record fails to substantiate this claim. The Kresge manager testified at length as to his conversation with Pollock and stated that he did not recall that Pollock had made any such reply (R. 99, 101).

The allegation relied upon by the Union refers to a *threat* made to the Employer to interfere with Kresge deliveries. Obviously such a threat would not have violated Section 8(b)(4) of the Act, as the Union claims. Section 8(b)(4) prohibits inducing or encouraging *employees* to engage in work stoppage or refusal to perform services. There were no such facts here.

Therefore, the "facts" did not "reasonably bring the controversy within" Section 8(b)(4) of the Act and Ohio courts had jurisdiction to enjoin that secondary boycott.

**THE UNION CANNOT SUSTAIN ITS PRESENT CLAIM THAT SECTION 8(b)(2) OF THE ACT WAS VIOLATED BY ITS PICKETING.**

For the first time the Union's brief in this regard contends as follows:

(1) That its interference with the performance of Employer's individual contracts of employment with its employees violated Section 8(b)(2) (Resp. Bf. p. 9);

(2) That picketing to compel an employer to sign a contract containing an "illegal" union security clause violates Section 8(b)(2) (Resp. Bf. p. 9);

(3) That if the Employer here had submitted to the Union's compulsion; had executed the contract demanded and had discharged any of its employees who refused to join the Union, then the Employer would have violated Section 8(a)(3) and the Union would have violated Section 8(b)(2) of the Act. The Employer then would have had a remedy before the Labor Board. (Resp. Bf. p. 12.)

**(1) The Interference With Individual Contracts of Employment.**

For the first time in this proceeding, the Union admits that its conduct interfered with the performance of the Employer's individual contracts of employment with its employees. And the Union now claims that its interference violated Section 8(b)(2) of the Act in that it was picketing to compel union membership or else force the discharge of employees "without complying with statutory authorization procedures." (Resp. Bf. p. 9.)

However, the Union's Answer alleged that

> "the conduct of the defendants * * * *is not* in conflict with or in *violation of the laws* or public policy *of the* * * * *United States.*" (R. 15-16.)

Until now the Union has claimed that its conduct did not interfere with the Employer's contracts or violate any provision of the Act. Obviously interference with contracts is not prohibited by Section 8(b)(2) of the Act. The Union's present claim as to its unlawful purpose is discussed below.

**(2) The Union's Claim That Its Picketing Violated Section 8(b)(2) of the Act.**

*The Union completely ignores the decision of the Labor Board in United Mine Workers (M. F. Fetterolf Coal Company),* 103 NLRB 1572 (1953), *which was cited in the Employer's Petition, and which is on all fours here.*

There, as here, the union picketed after the employers had refused union demands that they sign an agreement requiring union membership as a condition of employment (*supra*, at pages 1595, 1600, 1611). There, as here, the union did not represent a majority of the employees of the employers. There, as here, there had been only one meeting between the employers and the union officers (at page 1595) and there, as here, there had been no collective bargaining between the union and the employers.

There the Labor Board found this evidence to be

> "wholly inadequate to warrant a finding that * * *" (the union) "thereby engaged in any violation of Section 8(b)(2) of the Act."
>
> (103 NLRB 1572 at page 1612.)

*This decision constitutes an unreversed precedent.* It follows that the Union's picketing here did not violate Section 8(b)(2) and that Ohio courts had jurisdiction of the instant case.

Without mentioning this precedent, the Union cites an earlier case, namely, *Amalgamated Meat Cutters & Butcher Workmen,* 81 NLRB 1052 (1949). However, as pointed out in Employer's Petition herein (P. p. 20) the Union there, unlike here, demanded that the Employer execute a contract containing closed-shop provisions, i.e., one which would not have granted employees 30 days in which to join the Union, as required by the Act. The Union also relies on *International Union, United Mine*

*Workers of America*, 83 NLRB 916 (1949). However, that decision involved a refusal to comply with election procedures (since repealed) which were then required as a condition precedent to execution of a Union-Shop contract. *American Radio Association*, 82 NLRB 1344 (1949), also relied upon by the Union, is another case in which the union demanded employment conditions which would not, unlike the Union's demand here, have granted employees 30 days in which to join the union.

The above cases relied upon by the Union were all decided four years *prior* to the decision in *United Mine Workers* (M. F. Fetterolf Coal Co.), *supra*. Further, in each of the three cases the union-security provisions demanded of the employer were illegal under any circumstances.

Further, the "statutory authorization procedures" referred to by the Union (Resp. Bf. pp. 12-13), namely, the requirement of a union-shop authorization election, is inapplicable here, having been repealed in 1951 (65 Stat. 601).

**(3) The Union Suggests a Method Which Would Necessarily Require an Employer to Violate the Act in Order to Vest Labor Board Jurisdiction.**

The Union suggests that "Submission by petitioner to the compulsion allegedly arising from the conduct" (of the picketing) "would have been an unfair labor practice on the part of both employer and Union * * *" (Resp. Bf. p. 12). Thus the Union suggests that the Employer should have executed the agreement here demanded by it and, in violation of the individual contracts, should have discharged those employees who refused to join the Union; thus, the Union suggests, both the Employer and the Union

would have violated the Act and thereby have vested jurisdiction in the Labor Board. Obviously the only method of carrying out the Union's suggestion would require employers engaged in interstate commerce to violate the Act in order to obtain a remedy by the Labor Board. Comment seems unnecessary.

Obviously as there was here no "Submission by petitioner to" (the Union's) "compulsion," there resulted no violation of Section 8(b)(2).

**THE UNION IS IN ERROR IN CLAIMING THAT THE EMPLOYER HAD A REMEDY BY THE LABOR BOARD FOR THE PROTECTION OF ITS PRIVATE RIGHTS.**

The Union states "The Ohio Supreme Court did not agree that petitioner's constitutional rights had been impaired * * *" (Resp. Bf. p. 13). There was no ruling on that question, the Ohio Supreme Court being content to find only that employers engaged in interstate commerce must "initially" ascertain from the Labor Board whether it had jurisdiction (P. App. D, p. 15a).

The Union claims, but without showing any similarities, that the private rights involved here are the same as those involved in *Garner* and *Anheuser-Busch* (Resp. Bf. p. 14). This contention cannot be sustained.

*First.* In neither *Garner* nor *Anheuser-Busch* did an employer have private rights growing out of individual contracts of employment with its employees.

*Second.* In both *Garner* and *Anheuser-Busch* the injunctions were granted by reason of the unions' violation of state regulatory statutes, thereby enforcing public rights.

*Third.* In both *Garner* and *Anheuser-Busch* there was a conflict of remedy, as in each case a state statute and the

Act governed the same conduct. Here the Union's picketing is not violative of the Act, nor is it protected thereby. Therefore, there is no conflict of remedy here.

The Union further claims that even if Employer's private rights have been impaired that the duty of protection of such rights is vested exclusively with the Labor Board (Resp. Bf. p. 13), quoting from this Court's opinion in *Amalgamated Clothing Workers v. Richman Bros.*, 348 U. S. 511, 514. However, the Union omits the phrase "we assume" from the quotation. Obviously an *assumption* in an opinion does not have the effect of a *decision.*

The Union also relies on *Capital Service, Inc. v. N. L.R.B.*, 347 U. S. 501 (1954). There also this Court assumed but did not decide that the picketing was subject to the exclusive jurisdiction of the N.L.R.B.

> "And in Capital Service v. Labor Board * * * this Court granted a limited certiorari which *assumed* that exclusive jurisdiction over the subject matter was in the National Labor Relations Board. * * *"
>
> *Weber v. Anheuser-Busch*, 348 U. S. 468, 99 L. ed. (Advance page 391 (1955)).

Further, no private contract rights, as are involved here, were involved in the *Richman* and *Capital Service* cases.

**THE UNION HAS AT NO TIME CLAIMED THAT ITS CONDUCT WAS PROTECTED BY THE ACT.**

However, the Union cites *Anheuser-Busch, supra,* (Resp. Bf. p. 10) and argues that the ruling of the Ohio Supreme Court was correct here because a state cannot enjoin conduct found by the Labor Board to be protected by the Act.

As pointed out in Employer's Petition herein (P. p. 3) the Union at no time has claimed that its conduct was

protected by the Act. The Union has not now in its brief claimed its conduct to be protected. Nor does it show such applicability of any section of the Act. On the contrary, the Union now claims its conduct violated Section 8(b) (2) of the Act and that Section 8(b) (4) might possibly have been violated. Obviously the Union's conduct could not have been both specifically permitted (i.e., protected) by the Act and also specifically prohibited (i.e., violative) of the Act. In support the Union cites only *General Drivers v. American Tobacco Co.*, 348 U. S. 978 (1955) and the *Anheuser-Busch* case, *supra*. Both are inapplicable here.

The *American Tobacco* case involved a strike by a union representing a majority of employees. The Kentucky Court's injunction interfered with the conduct of the strike. Further, the union claimed that its conduct was protected by a specific section of the Act. No such situation exists here.

In *Weber v. Anheuser-Busch, supra,* unlike here, there was a strike by a union representing a majority of employees. There the employer claimed that the strike violated the Act. The Missouri Court's injunction interfered with the conduct of the strike. Here there is no claim by the Employer that the Act was violated and no specific claim by the Union that its conduct is protected.

**THE CONDUCT OF THE UNION HERE IS UNLAWFUL UNDER STATE POLICY DECLARED BY THE OHIO SUPREME COURT IN 1939 AND AGAIN SINCE ITS DECISION IN THE INSTANT CASE.**

The Union argues that there is in Ohio no "public policy" prohibiting execution or enforcement of agreements requiring union membership as a condition of employment "which is the equivalent of the 'State law' referred to in Section 14(b) of the Act." (Resp. Bf. p. 14.)

As shown in Employer's Petition, the decision of the Ohio Supreme Court in *Crosby v. Rath*, 136 Ohio State 352 (1939) established a public policy of Ohio prohibiting the coercion under the same facts as here of employees by their employer to join a union as a condition of their continued employment. There in an opinion "by the court" it was stated:

> "The thing upon which the defendants are insisting is that the plaintiff discharge her employees unless they become members of one of the defendant unions. There is no reason or convincing authority sustaining the contention of the defendants that they have the right to engage in picketing or boycotting under such circumstances." (136 Ohio State 352, at 355.)

While for a time violence was involved in the *Crosby* case, still as to that, the following is stated in an opinion of the Ohio Supreme Court in a case since its decision herein:

> "It is true that the decision in the *Crosby* case might have been based upon the fact that the picketing involved in that case had been accompanied by violence. However, the opinion 'by the court' does not base the decision upon that ground * * *."
>
> *Chucales v. Royalty*, 164 Ohio State 214 at page 222 (October 26, 1955).

**IN THE ABOVE RECENT CASE THE POLICY OF THE CROSBY CASE WAS REAFFIRMED BY THE OHIO SUPREME COURT.**

Since the decision in the instant case the Ohio Supreme Court decided *Chucales v. Royalty, supra.* Syllabus 2 of that opinion is as follows:

> "The public policy of Ohio, as determined by its courts, regards picketing against an employer as unlawful where there is no dispute between the employer and his employees and where the picketing is conducted by persons who were never employed by that employer and who do not represent anyone who ever was, and *where it is conducted for the purpose of pressuring the employer to compel his employees to join the union of those conducting the picketing.*"

The above facts are precisely the same as in the instant case. Therefore, contrary to the Union's claim, there is in Ohio a public policy making unlawful the Union's picketing here "for the purpose of pressuring the employer to compel his employees to join the union * * *."

**THE CROSBY AND CHUCALES DECISIONS SHOW THAT CONTRARY TO THE UNION'S CLAIM, ITS DEMAND HERE UPON THE EMPLOYER WAS UNLAWFUL UNDER OHIO LAW.**

The Union claims that a demand as here for execution of a contract requiring union membership as a condition of employment is "not forbidden by Ohio law" (Resp. Bf. p. 17).

The opinion in the instant case, but not the syllabus,[1] contains the following statement:

---

[1] Under Ohio law the syllabus alone states the law of the case. 91 Ohio State 264 (1915); 103 Ohio State 221 (1921); 123 Ohio State 336 (1931).

> "Those cases" (*Crosby* and *Anderson*) "hold that picketing was unlawful under the precise facts there in issue, but to go further and say on authority of such cases that the firm policy of Ohio is to prohibit agreements of the kind described in Section 164(b) is hardly tenable."

As will be hereinafter shown, the remaining six judges of the Ohio Supreme Court, being bound only by their syllabi, are in disagreement with the above statement.

*First.* In Syllabus 2 of the *Chucales* case (*supra*) the Ohio Supreme Court again, as in the *Crosby* case, holds picketing to be unlawful when for the purpose of compelling an employer to require union membership as a condition of employment.

*Second.* As to the Union's suggestion that agreements requiring union membership as a condition of employment are lawful in Ohio, the following is stated by the Ohio Supreme Court in its *Chucales* opinion:

> "It is argued that this court in *Grimes & Hauer, Inc. v. Pollock*, 163 Ohio St. 372, 127 N. E. (2d) 203, not only held that the public policy of Ohio does not oppose union shop agreements, but also questioned the reasons it had given for the *Crosby* case decision. There are statements in the opinion, *but not in the syllabus*, which might lend support to such conclusions * * *." (Emphasis by the Court.) (164 Ohio State at 223.)

It will be observed that the member of the Ohio Supreme Court, who wrote the opinion in the instant case, wrote dissenting opinions in both the *Crosby* and the *Chucales* cases.

It seems apparent that there is nothing in the Ohio Supreme Court's opinion in the instant case which holds that a demand for a contract requiring union member-

ship as a condition of employment or picketing for such a purpose is lawful in Ohio.

**THE CHUCALES DECISION SHOWS THAT THE OHIO SUPREME COURT ERRED IN ITS CONSTRUCTION AND APPLICATION HERE OF SECTION 14(b) OF THE ACT.**

The following statement also appears in the opinion of the Ohio Supreme Court in *Chucales v. Royalty, supra,* construing Section 14(b) of the Federal Act:

> "Those statements" (in *Grimes & Hauer*) "were made in answer to the contention that, because of Section 164(b), Title 29, U. S. Code, and because the common-law public policy of Ohio in effect establishes a 'right to work' law, the state court could enjoin the picketing involved in that case. However, even if there had been a statutory 'right-to-work' law in Ohio, the only effect of Section 164(b), Title 29, U. S. Code, would have been to prevent the National Labor Relations Board from acting in disregard of that law, as, for example, in authorizing execution or application of a union shop agreement. As this court recognized in the syllabus of the *Grimes & Hauer* case, the plaintiff therein was entitled to relief under povisions of the Labor Management Relations Act. Therefore the denial to Ohio of the right to enjoin the picketing in the *Grimes & Hauer* case * * * would not, to use the words of Section 164(b), be 'authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment'." (164 Ohio State 223, 224.)

The above quotation from the *Chucales* case we believe shows error here by the Ohio Supreme Court in construing the Act. It holds that even if there had been an Ohio *statute* protecting the right to work, it would have declined jurisdiction in the instant case. It gave two reasons which seem to be conflicting.

(1) That Section 14(b) is only a limitation upon the jurisdiction of the Labor Board and does not preserve the jurisdiction of state courts, and

(2) That denial here of jurisdiction of Ohio does not violate Section 14(b) because such denial does not authorize the execution or application in Ohio "of agreements requiring membership in a labor organization as a condition of employment."

In reason (1) above, the Ohio Supreme Court failed to follow applicable decisions of this Court in which it was stated:

(a) That Section 14(b) of the Act granted permission to the States "to carry out policies inconsistent with the Taft-Hartley Act." *Algoma Plywood & Veneer Co. v. W.E.R.B.*, 336 U. S. 301 at 314 (1949).

(b) That nothing in the Act sanctioned or forbade contract provisions requiring union membership as a condition of employment and that demands for such provisions "were left to regulation by the state." *Weber v. Anheuser-Busch*, 348 U. S. 468 (1955).

(c) That Section 14(b) granted to the States permission to enforce state law prohibiting picketing for the purpose of requiring union membership as a condition of employment. *Local No. 10 v. Graham*, 345 U. S. 192 (1953).

As to reason (1) it seems, therefore, that instead of Section 14(b) being merely a limitation upon the jurisdiction of the Labor Board, it preserves the jurisdiction of state courts to establish and enforce state policies concerning compulsory union membership.

As to reason (2), the Ohio Supreme Court construed Section 14(b) to be a limitation upon state court jurisdiction instead of a provision protecting it from preemption

by the Labor Board. The Ohio Supreme Court stated in effect that it had not violated Section 14(b) in declining jurisdiction in the instant case. That, we believe, was not an issue as to that Section. The issue was whether in view of Section 14(b) Ohio courts retained jurisdiction to forbid picketing, as here, violative of state policy.

## CONCLUSION.

There is now and has been in Ohio for many years "state law" established and now reaffirmed by its court of last resort, declaring picketing to be unlawful when its purpose is the pressuring of an employer, as under the facts here, to execute an agreement requiring union membership as a condition of continued employment. The Union's pressure upon the Kresge stores was a secondary boycott, also unlawful under Ohio common law. The Union's interference with the performance of the employment contracts of the Employer and its employees was also unlawful under Ohio common law.

A remedy was and still is unavailable from the Labor Board under Section 8(b) (2) of the Act (*United Mine Workers,* (M. F. Fetterolf Coal Co.) *supra*) or under Section 8(b)(4). Further, the Act contains no provision to protect the performance of the individual contracts of employment nor a provision forbidding the type of secondary boycott occurring here. Therefore, the facts here did not reasonably show a violation of the Act. (*Weber v. Anheuser-Busch, supra.*) The Union has not claimed and does not now claim that its conduct was protected by the Act. Further, by reason of Section 14(b) of the Act, Ohio courts have jurisdiction of this proceeding.

Therefore, the Ohio Supreme Court erred in holding that inasmuch as the Union's picketing "*relates* to unfair

labor practices" the Employer was required "initially at least" to present its grievance to the Labor Board.

For the reasons stated herein and in its Petition the Employer prays that a writ of certiorari issue to review the judgment of the Ohio Supreme Court in the instant case.

Respectfully submitted,

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